INDEX

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Statute Involved	2
Statement	2
Argument	5
I. The Decision Below Is Clearly Correct	7
A. Service Upon the Argentine Consul	8
B. Service in Buenos Aires	10
II. There Is No Conflict of Decisions	11
III. There Is No Important Question of Federal Law	12
Conclusion	13

CITATIONS

CASES:

Gray v. American Radiator & Sanitary Corporation, 22 Ill. 2d. 429, 176 N.E. 2d. 761 (1961)	10
Grobark v. Addo Machine Company, 16 Ill. 2d. 426, 158 N.E. 2d. 73 (1959)	11
Oster v. Dominion of Canada, 144 F. Supp. 746 (N.D. N.Y. 1956), 238 F. 2d. 400, cert. den. 353 U.S. 936	8, 9
Puente v. Spanish National State, 116 F. 2d. 43 (2 Cir. 1940), cert. den. 314 U.S. 627	8
Saletko v. Willys Motors Inc., 36 Ill. App. 2d. 7, 183 N.E. 2d. 569 (1962)	11
The Anne, 3 Wheat. 435 (1818)	8
The Sao Vincinte, 260 U.S. 151 (1922)	8

STATUTES:

Illinois Civil Practice Act, Section 17(1)(a), Illinois Rev. Stat., Ch. 110, Sec. 17(1)(a) (1964)	2, 3, 6, 10

MISCELLANEOUS:

Federal Rules of Civil Procedure, Rule 4	8
Tate Letter, 20 Dep. State Bull. 984 (1952)	5, 6, 7, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 582

THE PURDY COMPANY, *Petitioner,*

v.

ARGENTINA, a foreign state, and DIRECCION GENERAL FARICACIONES MILITARES OF ARGENTINA, *Respondents.*

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court are not reported. Copies of the orders are printed at pages 20, 22, 26, 27, 37-38 and 39 of the Joint Appendix. The Opinion of the Court of Appeals for the Seventh Circuit (Petition, Appendix A) is reported at 333 F. 2d. 95.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Can service upon an Argentine consul in the United States, who is not appointed as agent, confer upon a United States District Court *in personam* jurisdiction over the Government of Argentina or an Argentine Corporation?

2. Was the court below correct in holding that, under the facts of this case and the Illinois case law, Section 17(1)(a) of the Illinois Civil Practice Act, which authorizes extraterritorial service on any person transacting any business within Illinois, did not permit valid service upon an Argentine Corporation?

STATUTE INVOLVED

The pertinent provisions of the Illinois Civil Practice Act, Section 17(1)(a), Chapter 111, Ill. Rev. Stats., Sec. 17(1)(a) (1964) are set forth in the Petition at p. 3.

STATEMENT

This litigation concerns the attempts of Petitioner, The Purdy Company, an Illinois Corporation, to bring an *in personam* action in the State of Illinois against Respondents, The Republic of Argentina (Argentina) and Direccion General Fabricaciones Militares of Argentina (D.G.F.M.), an Argentine corporation.

The validity of two purported services of process was at issue below.

The complaint, filed in the District Court for the Northern District of Illinois, Eastern Division, on August 30, 1966, sought damages of some $87,000 for the alleged breach of a sales contract between Petitioner and D. G. F. M., negotiated and executed in

Buenos Aires, Argentina, November 14, 1956. Argentina was not a party to the contract, but the complaint stated that Argentina owned D.G.F.M. and operated by and through it.

The first purported service of process was made September 1, 1960, on both Respondents, by delivery of summonses to the Argentine Consul in Chicago. A second service was attempted upon Respondent D.G.F.M. only, in Buenos Aires, Argentina, on November 5, 1962.

Neither Respondent had offices, officers, directors or duly appointed agents within Illinois, and thus validity of the service upon the Argentine Consul in Chicago was dependent upon proof that he was Respondents' agent for receipt of process. The extraterritorial service in Argentina could be justified only by submission to jurisdiction under the terms of the Illinois Civil Practice Act.[1] Petitioner relied upon the sales contract with Respondent D.G.F.M., the opening of a letter of credit with a Chicago bank, and the routine functions of the Argentine Consul in processing shipping documents both to establish the Consul's agency and to demonstrate the transaction of business in Illinois. Apart from these three facts, there were no other "contacts" between the parties or between Respondents and the State of Illinois. There was no established pattern of business in Illinois, and the subject transaction was the only one between the parties.

After the complaint was filed, Respondent D.G.F.M. entered a special appearance and moved to dismiss on grounds of the lack of *in personam* jurisdiction. On June 21, 1961, the District Court dismissed the com-

---

[1] Section 17(1)(a), Ill. Rev. Stats., Ch. 110 (1964) "The transaction of any business within this state . . . ."

plaint as against Respondent D.G.F.M., but thereafter limited the order to quashing the summons and return, and the clerk was instructed to issue an alias summons directed to each of the Respondents. Two more orders were entered authorizing alias summons and appointing a process server. The first and only return of service on the alias summons was filed December 5, 1962. It purported to show service upon Respondent D.G.F.M. on November 5, 1962, in Buenos Aires, Argentina.

Respondent D.G.F.M. on December 21, 1962, filed a motion to quash service of process and to dismiss. The District Court granted the motion, stating:

> "... The Court finding that the defendant was not doing business in the State of Illinois within the meaning of Section 17(1)(a) of the Illinois Civil Practice Act ... the motion to quash the said purported service of summons be and it is hereby sustained."

On June 4, 1963, the cause again came before the court and an order was entered dismissing D.G.F.M. as a party.

On September 12, 1963, a default judgment in the amount of $86,909.77 was entered against Respondent Argentina, on the ground that it had failed to file an answer or otherwise defend.

Respondent Argentina entered a special appearance for the limited purpose of contesting *in personam* jurisdiction over it. Motions were filed to stay execution, to set aside the default, to quash service of process and to dismiss. An order was entered staying execution, and after exchange of briefs, the District Court, on November 15, 1963, entered an order quashing serv-

ice of process on Respondent Argentina and dismissing the case.

On June 11, 1964, the United States Court of Appeals for the Seventh Circuit affirmed the judgment orders of the District Court. Rehearing was denied on July 14, 1964.

ARGUMENT

There are no valid reasons for further review of this case. The questions presented are uncomplicated and routine. Stripped of rich verbiage and exhortation regarding the law of nations and foreign relations, which are not involved in this case, the issues are simple. They concern the acquisition of *in personam* jurisdiction as the result of two purported services of process: (1) Whether under the Federal Rules of Civil Procedure valid service was accomplished upon the Republic or Argentina or an Argentine corporation by delivery of process to the Argentine Consul in Chicago, and (2) Whether *in personam* jurisdiction was obtained by extraterritorial service on the corporate Respondent in the manner provided by the Illinois Civil Practice Act?

Petitioner urges that the decision below denying valid service frustrates a policy of the United States Department of State established by the so-called *Tate Letter*. (20 Dpt. Stat. Bull. 984, 985 (1952)). This letter states that the Department will no longer issue suggestions of sovereign immunity regarding the commercial or private acts (*jure gestionis*) of foreign governments.

The changed policy set forth in the letter is as irrelevant to this case as the former policy of the Department of State or in fact the policies of any other de-

partment of the Executive branch. The issues here relate to the acquisition of jurisdiction by service of process complying with the Federal Rules of Civil Procedure and/or with the Illinois Civil Practice Act. Nothing herein involves the relinquishment of jurisdiction because of the sovereign immunity of the foreign government defendant. Sovereign immunity, which was the subject of the *Tate Letter,* was not a basis of the decisions below and certainly it is irrelevant here.

There is no provision in the Federal Rules of Civil Procedure authorizing service upon a foreign sovereign. Thus, the first service, which was made upon the Argentine Consul in Chicago, can be valid only if the Consul was a proper agent of Respondents. There was no specific appointment, nor can an agency relationship be established on common law principles.

Petitioner must rely upon the sales contract between it and Respondent D.G.F.M. However, the contract does not contain a specific appointment of an agent. It is a routine international sales contract. The facts do not establish an agency for purposes of service of process and the courts below so found.

Validity of the extraterritorial service is dependent upon Section 17(1)(a) of the Illinois Civil Practice Act. The courts below found that the facts did not meet the statutory standard, ". . . transaction of any busines within . . ." Illinois, and thus that *in personam* jurisdiction could not be obtained by extraterritorial service.

The decision below was manifestly correct. Petitioner's assertions of conflict are not of the kind specified in Rule 19. Conflicts between the policies of the

Departments of Justice and State (Petition, p. 10) if any there be, are hardly appropriate for review. No decisions of this Court, or any other court, holding that effective service may be obtained upon a foreign government by delivery of process to one of its Consuls have been cited. The assertions of conflict, at most, amount to arguments that the decisions below were incorrect. There is no important question of Federal law requiring decision by this Court. Standards for effective service under the Federal Rules of Civil Procedure are completely covered by numerous decisions of this Court and the lower federal courts. The alleged extraterritorial service is dependent upon an interpretation of an Illinois statute, and the decision below is in accord with the Illinois cases.

I

THE DECISION BELOW IS CLEARLY CORRECT

The great bulk of the Petition is devoted to arguments that the decisions below were incorrect. Although not so headed, Sections I, II, III and V are arguments that the Court of Appeals erred. The Petition uses the *Tate Letter* again and again in an attempt to create conflicts and arguments which have no place in this case. Much as the Petition may argue to the contrary, the policy expressed in this letter, and any issues which may arise from its application or non-application, are absolutely irrelevant to this case. The issues here concern the acquisition of *in personam* jurisdiction by effective service of process in accordance with the Federal Rules of Civil Procedure and or the Illinois Civil Practice Act.

The *Tate Letter* did not purport to, and could not have changed, the law regarding the acquisition of

jurisdiction over a foreign sovereign. There are no public pronouncements of the Departments of State or Justice to support the concept that the "intent of the Department of State must be to allow *in personam* jurisdiction, . . ." to be acquired by service upon consular officers. (Petition, p. 11) The cases cited in the Petition are not in point; they deal with freedom of a foreign sovereign's property from execution or acquisition of jurisdiction by attachment.

A

Service Upon The Argentine Consul

The Petition argues, in Section III, that the decision of the court below is not supported by authority. This assertion, which is directed to the validity of service upon the Argentine Consul in Chicago, simply is not accurate. The fundamental point is that the Federal Rules of Civil Procedure do not contemplate *in personam* service upon a foreign sovereign. Rule 4 covers a wide range of potential defendants, but there is no reference to a foreign government. *Oster* v. *Dominion of Canada*, 144 F. Supp. 746 (N.D. N.Y. 1956), 238 F. 2d. 400, cert. den. 353 U.S. 936; *The Anne*, 3 Wheat. 435 (1818); and *Puente* v. *Spanish National State*, 116 F. 2d. 43 (2 Cir. 1940), cert. den. 314 U.S. 627. The limited authority of a consul to act as the representative of his government in judicial proceedings has been recognized by this Court. *The Sao Vincinte*, 260 U.S. 151 (1922).

It is worthy of note that Petitioner cites no cases to support its argument that a consular officer is an appropriate agent for service, but merely attempts to distinguish *Oster* v. *Dominion of Canada, supra* on untenable grounds. The *Oster* case involved a tort claim;

herein a contract claim is involved. From this immaterial distinction, Petitioner attempts to argue that the consul's routine processing of the shipping documents herein amounted to "commercial dealings" which somehow gave him greater authority than that possessed by the consul in the *Oster case*. (Petition, p. 16) Whatever may be the significance of commercial acts (*jure gestionis*) within the *Tate Letter* as they relate to sovereign immunity, the point is irrelevant here. That a lawsuit is in contract rather than in tort cannot increase the authority of a Consul to accept service of process nor amend the Federal Rules of Civil Procedure.

The sales contract did not create an agency between Respondents and the Argentine Consul. The only possibly relevant part of the contract is the Manner of Payment clause which reads, in part:

> "(a) Ninety percent upon presentation of the following documentation:
>
> "(1) Complete set of Bills of Lading, . . .
>
> "(2) Commercial invoice, in quadruplicate (original and duplicate) establishing the C. & F. value of the goods in Buenos Aires, duly legalized by *an Argentine Consul* (emphasis added).
>
> "(3) Argentine Consular Invoice, in triplicate, duly legalized.
>
> "(4) Certificate of inspection . . . ." (Joint Appendix, pp. 17, 18.)

The above quotation contains the only reference to *an* Argentine *consul*, which is to be found in the entire contract, and this reference is not to *the* Argentine Consul *in Chicago*, but to *an* Argentine consul. The

selection of *an* Argentine consul from the many available in the United States was a matter within Petitioner's discretion. It could and did select *the* Argentine Consul *in Chicago* as a matter of its convenience to perform the routine function of "legalizing" (notarizing) the shipping documents.[2] Nevertheless, Petitioner would contend that *the Argentine Consul* in *Chicago* who was selected by it is an appropriate agent of Respondents' for purposes of service of process. The actions of *the* Consul selected by Petitioner in processing routine shipping documents, plus the opening of a letter of credit and payments against it, which were the only relevant facts, did not amount to an appointment of *the Argentine Consul in Chicago* as an agent of the respondents for the purposes of service.

B

Service in Buenos Aires

Under the title of "Conflict," the Petition argues in Section V that the decision is not in accord with the Illinois cases. At issue below was whether the Illinois statute,[3] providing for extraterritorial service, authorized the service made upon Respondent D.G.F.M. at its offices in Buenos Aires, Argentina. The Petition cites a single case, *Gray* v. *American Radiator & Sanitary Corporation,* 22 Ill. 2d. 429, 176 N.E. 2d. 761, (1961). This case concerned a tort committed in Illi-

---

[2] Petitioner repeatedly alleges that it was a required "condition precedent" to payment that "the Argentine consul (in Chicago) duly legalize and approve invoices and other documents . . . before payment could be made." (See Petition, pp. 4, 15, 19. The word "approve" appears six (6) times on page 4.) There is absolutely no justification for these assertions.

[3] Ill. C.P.A. Sec. 17(1)(a).

nois and was decided under an entirely different and inapplicable provision of Section 17. *Saletko* v. *Willys Motors, Inc.*, 36 Ill. App. 2d. 7, 183 N.E. 2d. 569 (1962). The leading case regarding the statutory test in contract actions: ". . . the transaction of any business within this state . . . ." is *Grobark* v. *Addo Machine Company*, 16 Ill. 2d. 426, 158 N.E. 2d. 73 (1959). The court below correctly held that the *Grobark* case was controlling, citing numerous decisions in support. Thus, the Court of Appeals sustained the finding of the District Court that Respondent's acts of establishing a letter of credit with an Illinois bank, and contractually requiring that payments thereunder be made against invoices "duly legalized by *an* Argentine Consul," did not meet the standard of the Illinois statute so as to authorize the service attempted in Buenos Aires.

II

THERE IS NO CONFLICT OF DECISIONS

Petitioner attempts to create "conflicts" by alleging conflicting policies of the Departments of Justice and State (Petition, p. 10) and by citing dicta of the court below as being contrary to the decisions of this Court. Petitioner has not cited cases from other Circuit Courts of Appeals or this Court which approve the acquisition of *in personam* jurisdiction over a foreign government by either of the methods attempted herein. Patently, there is no conflict other than that created by the Petition. In fact, the decisions in point are entirely consistent.

The court below responded to Petitioner's pleas of the hardship occasioned by the decision, pointing out that jurisdiction *in rem* or upon a counter claim could

be obtained.[4] Petitioner has fastened upon this dicta and builds an illusory "conflict" upon it. It is argued in Section II of the Petition that since *in rem* jurisdiction is a matter of state law and decisions of this Court have held "that foreign affairs is to be treated *solely* as a matter of federal law . . ." there is a conflict. (Petition, p. 13) Foreign affairs is not an issue in this case, and thus if conflict there be, it is between a statement of dicta and a contrived irrelevancy.

Petitioner is completely inconsistent, even if one were to assume that the argument has substance. On the one hand it is argued that acquisition of *in rem* jurisdiction in accordance with state law conflicts with decisions of this Court. On the other hand, Section V of the Petition argues that effective jurisdiction was acquired under the Illinois state law, I.C.P.A. 17(a)(1).

III

THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW

Clearly the narrow and limited issues in this case do not present an important question of Federal law. The isues are whether two alleged services of process were made in accordance with the Federal Rules of Civil Procedure or an Illinois statute. Nothing is more thoroughly established than that service in Federal Courts can only be in accordance with the Rules. The decision regarding the Illinois Civil Practice Act is supported by a long and uniform series of

[4] The court also could have noted specific appointment of an agent, or consent to jurisdiction by appearance or by contract. However, it should be noted that in this instance Petitioner in the sales contract expressly agreed to jurisdiction of the National Special Courts in the City of Buenos Aires (Joint Appendix, pp. 18-19).

opinions from the Illinois appellate courts and the Seventh Circuit Court of Appeals. Much as Petitioner may argue, there is no question here regarding sovereign immunity, foreign affairs, or the policies of the Department of State.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE C. PENDLETON
1155 15th Street, N. W.
Washington, D. C. 20005
296-3800

BERNARD S. KAPLAN
38 South Dearborn Street
Chicago 3, Illinois

Attorneys for Respondents

CULBERTSON, PENDLETON AND PENDLETON
Of Counsel